

1 LUBIN AND ENOCH, P.C.
2 Stanley Lubin (AZ 003076)
3 349 North 4th Avenue
4 Phoenix, Arizona 85003-1505
5 Telephone: (602) 234-0008
6 Facsimile: (602) 626-3586
7 Email: Stan@lubinandenoch.com

8
9 STUMPHAUZER | O'TOOLE
10 Matthew A. Dooley (OH 0081482)
11 Anthony R. Pecora (OH 0069660)
12 Dennis M. O'Toole (OH 0003274)
13 5455 Detroit Road
14 Sheffield Village, Ohio 44054
15 Telephone: (440) 930-4001
16 Facsimile: (440) 934-7208
17 Email: mdooley@sheffieldlaw.com
18 apecora@sheffieldlaw.com
19 dotoole@sheffieldlaw.com

20 CONSUMER LITIGATION ASSOCIATES, P.C.
21 Leonard A. Bennett (VA 27523)
22 Susan M. Rotkis (VA 40693)
23 763 J. Clyde Morris Blvd. 1-A
24 Newport News, Virginia 23601
25 Telephone: (757) 930-3660
26 Facsimile: (757) 930-3662
27 Email: lenbennett@clalegal.com
28 srotkis@clalegal.com

29
30 IN THE UNITED STATES DISTRICT COURT
31 FOR THE DISTRICT OF ARIZONA

32 KELVIN D. DANIEL, et al

33 Case No. 2:11-cv-01548-PHX-ROS

34 Plaintiffs,

35 v.

36 SWIFT TRANSPORTATION CO. OF
37 ARIZONA, LLC

38
39 PLAINTIFFS' REPLY TO
40 DEFENDANT'S RESPONSE TO
41 PLAINTIFFS' MOTION FOR LEAVE
42 TO FILE SECOND AMENDED
43 COMPLAINT

44
45 Assigned to: Hon. Roslyn O. Silver

1 **A. Plaintiffs' Motion is timely and should not be a surprise Swift.**

2 Actual discovery regarding Plaintiffs' individual claims remains open through
3 May 31, 2013. Class discovery ended September 14, 2012, with Plaintiffs' Rule 23
4 motion due by and filed on October 1, 2012. Plaintiffs contemporaneously sought leave
5 to amend their complaint to remove claims, which Swift's production and disclosed
6 evidence revealed would not apply to Plaintiffs, and to expressly plead that, which
7 Swift's counsel already understood – Plaintiffs are members of the class and subclass on
8 whose behalf Counts III and IV were originally brought. Plaintiffs endeavored to state
9 their claims and the class definition that Swift has, in the late stages of class discovery,
10 asserted to be most applicable and appropriate. Now, in opposing what should have been
11 an agreed motion, Swift claims surprise and asserts that Plaintiffs should have known
12 what Swift belatedly disclosed.

13 Swift's surprising opposition is founded on two false factual premises: (1) that
14 Plaintiffs knew fully of Swift's procedures and timing for the use of their consumer
15 reports – and the reports of putative class members – before Swift's August and
16 September disclosures of documents and depositions of Swift's witnesses such that they
17 should of known much earlier that they were members of the classes described in the
18 original Counts III and IV; and (2) that in the context of what Swift has asserted,
19 disclosed, negotiated with Plaintiffs and understood as Plaintiffs' case, the Plaintiffs'
20 Motion was unduly and prejudicially delayed. Plaintiffs acted promptly upon the
21 completion of the depositions and belated receipt of Swift's production to amend their
22 complaint and Swift cannot truthfully represent to the Court that it was in the remotest
23 way surprised.

1 Swift completed Plaintiffs' depositions – each taking over nearly 6 hours in its
2 counsel's Arizona office – and served and received substantive and complete responses to
3 19 Interrogatories and 19 Requests for Production. Swift served document subpoenas
4 upon Plaintiffs' every known past and present employer and received substantive
5 responses accordingly. Swift truthfully exhausted all discovery options and turned over
6 every rock it could find looking for evidence as to Plaintiffs. It cannot legitimately assert
7 it would have (or even could have) done anything differently had Plaintiffs moved to
8 conform the complaint any sooner, or any later.

9 On the other hand, Plaintiffs have had to push and pull their way through
10 discovery, requiring multiple meet and confer conferences, tolerating no less than 10
11 supplemental disclosure sets (objecting finally to the 11th) and having to narrow greatly
12 the range of deposition testimony they would force from Swift, even less than three
13 weeks before moving to amend their complaint. After a long struggle to obtain
14 documentary and witness evidence, Plaintiffs were able to take critical depositions of
15 Swift's employees and received several hundred thousand pages of Swift documents in
16 August. Thereafter, Plaintiffs served their follow-up Rule 30(b)(6) Notice of Deposition
17 (the "Notice") upon Swift on August 30, 2012. (Doc. 78). The timing of this deposition
18 was founded on the rolling nature of Swift's document production and Swift's disclosures.
19 Indeed, after Plaintiffs conducted various Rule 30(b)(1) depositions on August 1, 2012,
20 Swift served the following discovery documents totaling approximately 332,302 pages:

21 • 8th Supplemental Responses to Request for Production of Documents
22 (served August 7, 2012)

23 • 8th Supplemental Disclosures (served August 10, 2012)

- 1 • 2nd Amended Answers to Interrogatories (served August 15, 2012)
- 2 • 9th Supplemental Responses to Request for Production of Documents
- 3 (served August 22, 2012)
- 4 • 10th Supplemental Responses to Request for Production of Documents
- 5 (served August 30, 2012)
- 6 • 9th Supplemental Disclosures (served August 30, 2012)
- 7 • 10th Supplemental Disclosures (served September 10, 2012)
- 8 • 11th Supplemental Disclosures (served September 11, 2012)
- 9 • 3rd Amended Answers to Interrogatories (served September 11, 2012)

11 The Rule 30(b)(6) deposition is not simply relevant to Plaintiffs' Motion because it
 12 supports Plaintiffs' position that they were not dilatory, but also because exchanges
 13 between counsel reveal the fact that Swift fully understood what it was defending long
 14 before the filing of the corrective complaint. At no point did Swift object to the scope of
 15 Plaintiffs' Notice based upon a contention that Plaintiffs were seeking information
 16 regarding a class of non-in-person applicants or a class that they would now somehow
 17 claim that Plaintiffs do not represent. To the contrary, on September 4, 2012, and
 18 specifically referencing Plaintiffs' First Amended Complaint ("FAC"), Swift stated, "In
 19 the Notice, Plaintiffs appear to be seeking, for example in Topics 1 and 3, specific
 20 numbers of applicants for Counts III and IV. If we had that information, or could easily
 21 provide it, Plaintiffs would have it by now."¹ (Ex. A) Swift further confirmed that it had
 22 dumped hundreds of thousands of documents on Plaintiffs without ever stating which
 23 documents were sufficient to answer the question. *Id.* In short, Swift asserted that after
 24

25 ¹ Topic 1 sought "The number of applicants who applied to Swift electronically, by
 26 phone, or by facsimile each calendar year from 2006 through 2012."

1 producing these documents, it was up to Plaintiffs to figure out "who, when, where, and
 2 why."

3 After the parties conferred, Plaintiffs wrote to Swift on September 7, 2012 offering
 4 to narrow or withdraw many topics originally listed in Plaintiffs' Notice. Plaintiffs
 5 specifically stated,

6 The Plaintiff has pled four basis classes. I expect that we may not proceed
 7 to certification upon the first two of these, the 'Inadequate Disclosure and
 8 Authorization In-Person Contact class and the 'Pre-Adverse'. The third
 9 class, titled 'Inadequate Disclosure and Authorization Contact by Facsimile,
 10 Telephone, Mail, Computer and Similar Means' will be premised upon the
 11 class of applicants for whom Swift used one of the limited range of
 12 applications produced by you in discovery and to which your client's
 13 management deponent has already testified.

14 *****

15 The fourth putative class, currently titled, 'Adverse Action Contact by
 16 Facsimile, Telephone, Mail, Computer and Similar Means' class, should
 17 also be subject to stipulation.

18 Swift responded to Plaintiffs' proposal on September 10, 2012 agreeing among
 19 other things, to "not contest numerosity of the putative class set forth in ***Count III of the***
 20 ***FAC.***" (emphasis added) (Ex. B). Shortly thereafter, Swift served its 10th and 11th
 21 Supplemental Disclosures, which led to the parties' submission of a discovery dispute to
 22 the Court. Prior to the Court's resolution of the dispute, Plaintiffs served an Amended
 23 Notice of 30(b)(6) Deposition (the "Amended Notice"), which narrowed or withdrew
 24 certain topics, and included additional topics regarding the belated declarations later
 25 excluded by the Court. (Doc. 82). Swift again objected to certain topics, but not on the
 26 basis that the Amended Notice addressed non-in-person applicants. (Ex. C).

27 Prior to conducting their 30(b)(6) deposition, Plaintiffs attempted to gather
 28 information regarding the uniformity of Swift's procedure to use consumer reports to

1 evaluate non-in-person applicants during the August 1, 2012 30(b)(1) depositions.
 2 (August 1, 2012 Cordova Dep. pp. 19-29, 32-33, 35-36, 39-42, 45-72, 73, 76-80, 81-82,
 3 83-85, 92-95, 99-100). The majority of the *documents* evidencing the class-wide nature
 4 of the Swift's FCRA violations was produced *after* Plaintiffs conducted their 30(b)(1)
 5 depositions.

7 Lastly, Swift's own interrogatory responses evidence Swift's understanding that
 8 Plaintiffs would seek to certify a class of non-in-person applicants. On September 11,
 9 2012, and in its Third Amended response to Plaintiffs' Interrogatory No. 16 inquiring into
 10 Swift's challenge to certification, Swift stated, "Further, as discovery has revealed, it may
 11 be impossible to ascertain and/or identify the putative class members *for Counts I*
 12 *through IV of the FAC.*" (emphasis added).

14 **B. Plaintiffs have good cause to amend their complaint.**

16 Under Rule 16(b)(4), a scheduling order may be modified "only for good cause
 17 and with the judge's consent." As Swift points out in its opposition, this Court addressed
 18 the dynamic between Rules 15 and 16 and the "good cause" standard in *Johns v.*
 19 *AutoNation USA Corp.*, 246 F.R.D. 608, 609-10 (D. Ariz. 2006) ("the focus of the [Rule
 20 16] inquiry is upon the moving party's reasons for seeking modification. If that party
 21 was not diligent, the inquiry should end.").

23 At the core, Swift contends that after providing certain documents regarding
 24 Plaintiffs' job applications, Plaintiffs were on notice that their First Amended Complaint
 25 was defective. However, Swift's arguments wholly ignore the class action nature of this
 26 litigation, and fail to address its own delayed production of information necessary to
 27

1 confirm that the allegations set forth in Plaintiffs' Second Amended Complaint ("SAC")
 2 are in fact accurate.²

3 **1. The timing of Plaintiffs' Motion.**

4
 5 While the timing of Plaintiffs' motion is an important consideration, it is not
 6 dispositive of the issue of good cause. Considering timing as a sheer number of days or
 7 months without any factual context is misleading. Whether the timing of a request
 8 exhibits diligence on behalf of the movant depends entirely on the facts and
 9 circumstances of the case.

10
 11 Over a lengthy, arduous, nine-month discovery period, Swift produced over
 12 1,000,000 pages of documents, some of which were relevant to this action, and very
 13 much of which was clearly not. During this period, "what happened at Swift" regarding
 14 not only Plaintiffs' applications, but the entire putative class continued to develop. For
 15 example, Michelle Cordova confirmed on August 1, 2012 the date, time and type of
 16 consumers Swift regarding Daniel. (August 1, 2012 Cordova Dep. p. 66-68). Similarly,
 17 during the last phase of discovery, Swift's treatment of Hodges' application status became
 18 clear and more salient.³ Swift implies that Plaintiffs knew and understood Hodges' and
 19 Daniel's application status much earlier, but this is simply not true. Moreover, critical to
 20 class certification discovery was Swift's uniform policy and procedure to use consumer
 21
 22

23
 24 ² A redlined version of the SAC is attached hereto as Exhibit D.

25
 26 ³ Through the discovery process, it was also determined that Swift did not procure
 27 Hodge's criminal background report until December 14, 2009, while processing her
 28 December 12, 2009 online application. Even today, the parties dispute whether Hodges'
 prior in-person contact with Swift was sufficient to require Swift to provide Hodges with
 a clear, conspicuous and stand alone written disclosure in accordance with 15 U.S.C. §
 1681b(b)(2)(A). Nonetheless, both the SAC and Plaintiffs' Motion for Class Certification
 accept Swift's viewpoint.

1 reports in a manner inconsistent with the FCRA. This class-wide practice was ferreted
 2 out over the *entire* course of class discovery. Moreover, Swift points to arguments made
 3 in their early Motion to Dismiss (Doc. 24) as well as applications produced amongst the
 4 millions of pages of discovery, but Swift's use of Plaintiffs' consumer reports were
 5 amongst facts disputed by the parties even into the last phase of discovery.⁴
 6

7 **2. No new claims or factual allegations not fully known or subjected to
 8 discovery were added to the SAC.**

9 Swift also claims that the SAC asserts "new facts and a new theory of liability
 10 against Swift, claiming that Swift failed to provide notice to non-in-person applicants as
 11 required by 15 U.S.C. § 1681b(b)(2)(B)(i)." (Doc. 98 p. 12). Plaintiffs have consistently
 12 alleged that Swift procured non-in-person applicants' consumer reports without the
 13 applicants' authorization. (FAC, Doc. 19, Count III). Simply put, Swift's failure to
 14 provide the required disclosures prior to obtaining consumer reports tainted any
 15 perceived authorization from the applicants. The SAC merely states the obvious.
 16

17 As reviewed in painstaking detail with Swift's 30(b)(6) designee on September 14,
 18 2012, Plaintiffs focused the entirety of their cross-examination on the means of
 19 identifying non-in-person (primarily internet) applicants. Moreover, Plaintiffs' cross
 20 examination of Swift's 30(b)(1) witnesses likewise concentrated on Swift's internet
 21 application process. (August 1, 2012 Cordova Dep. pp. 19-29, 32-33, 35-36, 39-42, 45-
 22
 23
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 25

26 ⁴ In addition to ignoring the factual context, Swift seeks to pre-empt a decision on the
 27 merits based on a mere technicality. *Foman v. Davis*, 371, U.S. 178, 181 (U.S. 1962).
 28 Swift's opposition is contrary to the spirit of the Federal Rules of Civil Procedure and
 intended to extinguish the rights of thousands of consumers.

1 72, 73, 76-80, 81-82, 83-85, 92-95, 99-100).⁵ Swift withheld producing the call script
 2 used to communicate with applicants until September 10, 2012 well after the 30(b)(1)
 3 depositions had concluded. (Ex. E). And while the Court excluded the belated
 4 declarations, it is notable that Swift has been contacting putative class members who
 5 applied online – not in person.

7 Even Plaintiffs' 30(b)(6) Notice and Amended Notice addressed non-in-person
 8 applicants – a subject never challenged by Swift. The notion that Swift is somehow
 9 surprised and prejudiced by the allegations set forth in the SAC is disingenuous at best.
 10 But even if the Court grants Plaintiffs' Motion for Class Certification, merits discovery
 11 does not close until May 31, 2013.

13 As explained by Plaintiffs above, Swift expertly timed its disclosure of relevant
 14 documents and electronic information such that Plaintiffs were forced to use every single
 15 day of the 9-month discovery period to obtain the information necessary to prosecute
 16 their claims. Indeed, Plaintiffs were unable to complete their Rule 30(b)(6) deposition
 17 until September 14, 2012, the last day of discovery, due to Swift's belated Tenth and
 18 Eleventh Supplemental Disclosures. Swift's delay tactics became so prejudicial that
 19 Plaintiffs were forced to submit a discovery dispute to the Court.

22
 23
 24 ⁵ The content of Swift's telephonic disclosure to non-in-person applicants was specifically
 25 discussed with Summer Mate, one of Swift's recruiters:

26 Q. Okay. Aside from telling the applicant that you're going order the DAC
 27 report and the MVR report, do you say anything else to the applicant about
 28 those reports?

A. No.

August 1, 2012 Mate Dep. p. 54-55.

1 Swift suggests that a class representative must move to amend his complaint
 2 before class certification is complete, and thus before he has a true understanding of a
 3 defendant's class-wide conduct. Here, the Court bifurcated the discovery process such
 4 that merits discovery may proceed until May 31, 2013 if Plaintiffs' Motion for Class
 5 Certification is granted. (Doc. 40, p. 2). Consequently, Plaintiffs' proposed SAC would
 6 not necessitate any extensions to the remaining deadlines established by the Court's Rule
 7 16 Order, and no additional discovery should be required. Indeed, both parties have
 8 proceeded with class certification discovery, accepting the probability that Plaintiffs
 9 would ultimately define the class to include non-in-person applicants. This fact was
 10 underscored by the claims of Robert Bell, who was previously a class representative of
 11 consumers who applied to Swift online, by facsimile, telephone, or other non-in-person
 12 means.⁶

13 Moreover, nearly every page of Swift's document production and rolling
 14 disclosures pertained to online applicants, even well after Bell dismissed his claims. In
 15 fact, there is absolutely nothing Swift would have done differently in the case. All of its
 16 defenses and disclosures have been limited to the view that Swift's evidence would
 17 establish that Daniel, Hodges and nearly every similar consumer was a non-in-person
 18 applicant.

19 **C. Swift's opposition is a misguided collateral attack against class
 20 certification.**

21 Swift's opposition to Plaintiffs' motion for leave is likely intended to bolster its
 22 opposition to class certification. But Swift's approach ignores an important facet of the

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 28 ⁶ Upon receiving information that Swift did not procure Bell's consumer report, Plaintiffs
 voluntarily dismissed his claims on May 21, 2012. (Doc. 57).

certification process: the Court maintains discretion to modify class definitions beyond those set forth in the pleadings under Rule 23. Courts analyzing this “broad discretion” in similar procedural postures have held that a court may (1) amend a class definition anytime before a decision on the merits is rendered, (2) amend or alter a certification order before final judgment, or (3) even modify the class after the conclusion of discovery. *See Jordan v. Commonwealth Fin. Sys.*, 237 F.R.D. 132, 136 at *FN3 (E.D. Pa. 2006); *see also* Fed R. Civ. 23(c)(1); *see also* Newberg on Class Actions § 6:14 (4th ed. 2006).

For example, in *Jordan*, the plaintiff filed a class action complaint under the Fair Debt Collection Practices Act (FDCPA) and the Pennsylvania Fair Credit Extension Uniformity Act (FCEUA). *Jordan* at 136. In his complaint, the plaintiff proposed only two classes, but later moved for certification of a third class. *Id.* The court, granted the plaintiff’s motion for class certification approving all three classes, not just the two classes alleged in the plaintiff’s complaint. *Id.* at 136, 140. The only relevant fact to this determination is whether Plaintiffs are members of the class they seek to represent at the time the class is certified by the district court, and they are. *See e.g. Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-17 (1974) (to have standing to represent a class, a proposed class representative must be part of the class – i.e. possess the same interest and suffer the same injury shared by all the members of the class he represents).

Respectfully submitted,

By: /s/ Matthew A. Dooley

/s/ Leonard A. Bennett

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Reply in Support of Plaintiffs' Motion for Leave Amend Pleadings was filed electronically this 12th day of October, 2012. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Matthew A. Dooley
Counsel for Plaintiffs